

IN THE COURT OF APPEALS
STATE OF GEORGIA

LONGLEAF ENERGY ASSOCIATES, LLC,

Appellant,

v.

FRIENDS OF THE CHATTAHOOCHEE, INC.,
and SIERRA CLUB,

Appellees.

Appeal Case No. A09A0387

BRIEF OF APPELLEES

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PART ONE:

INTRODUCTION AND STATEMENT OF MATERIAL FACTS

OVERVIEW OF THE CLEAN AIR ACT

This case arises under one of the nation’s most important environmental laws, the federal Clean Air Act (“CAA” or “Act”). That act provides a comprehensive framework “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). Through the State Implementation Plan (“SIP”), which is a set of regulations promulgated by the State of Georgia and approved by the United States Environmental Protection Agency (“EPA”), Georgia and the federal government attempt to attain and maintain pollution levels in the atmosphere that will not unreasonably threaten public health and the environment. 42 U.S.C. § 7409. In part, EPA attempts to accomplish this goal by setting National Ambient Air Quality Standards (“NAAQS”). *Id.* EPA has established such air quality standards for six pervasive pollutants, and Georgia constantly monitors to determine whether areas are attaining those standards. Areas currently meeting the standards, such as Early

County, are called “attainment areas.” Areas failing to meet the standards are called “non-attainment areas.”¹

Congress was particularly concerned that attainment areas that meet air quality standards continue to do so. Thus, although new industrial facilities are allowed in these attainment areas, significant deterioration in air quality is not allowed. To achieve that goal, Congress created the Prevention of Significant Deterioration (“PSD”) program, which, as explained more fully below, requires developers of new major pollution sources (1) to predict how much pollution their new facility would produce and (2) to obtain a permit with stringent emission limits based upon state-of-the-art, cost-effective processes and technology. 42 U.S.C. §§ 7470-79. PSD permits in Georgia are issued by the Environmental Protection Division (“EPD”). Petitioners brought this action because the PSD permit issued for Longleaf neither protects adequately all air quality standards nor contains proper emission limits.

¹ For instance, the air quality in Atlanta does not meet the air quality standard for ozone, so it is a non-attainment area for that pollutant.

State Air Quality Regulations

In concert with the federal Clean Air Act, the Georgia Air Quality Act gives EPD the authority (1) to promulgate regulations that will go into the SIP and (2) to issue PSD permits. The portion of Georgia's SIP implementing the PSD program was first approved by the EPA on September 18, 1979, and it has been revised five times since then. *See* Georgia SIP, 391-3-1-.02(7) and 44 Fed. Reg. 54047 (Sept. 18, 1979), 47 Fed. Reg. 6017 (Feb. 10, 1982), 57 Fed. Reg. 24371 (June 9, 1992), 57 Fed. Reg. 58989 (Dec. 14, 1992), 1996 61 Fed. Reg. 3817 (Feb. 2, 1994), and 64 Fed. Reg. 67491 (Dec. 2, 1999).

Georgia's SIP imposes broad restrictions on proposed new pollution sources like the Longleaf plant. Pursuant to the Georgia SIP, "[n]o person shall construct or operate any facility from which air contaminants are or may be emitted in such a manner as to fail to comply with . . . [a]ny applicable increment, precondition for permit, or other requirement established for the Prevention of Significant Deterioration pursuant to Part C, Title I of the Federal Act." Georgia SIP, 391-3-1-.02 (1)(c).

A new major stationary source in an area of the state that, at the time of permitting, is in compliance with the federal ambient air quality standards must receive a PSD Permit from the EPD Director before construction on the facility begins. Ga. Comp. R. & Regs. r. 391-3-1-.02 (7); 40 C.F.R. § 52.21; 42 U.S.C. § 7475. Because the Longleaf power plant, if built, would constitute a new “major source” of air pollution in an area presently in attainment of all national air quality standards, it is subject to PSD regulations.

Prevention of Significant Deterioration (PSD)

The requirements for a PSD permit are found in the Georgia SIP. In implementing this program, however, Georgia never developed its own set of regulations. Rather, it has simply incorporated by reference detailed regulations developed by EPA. Georgia SIP, 391-3-1-.02 (7), 40 C.F.R. § 52.21. The PSD requirements call for every new major² source to be reviewed to determine the

² The PSD review requirements apply to such major sources that emit 250 tons or more of a regulated pollutant per year. 40 C.F.R. § 52.21(b)(1)(i)(a) – c); 42 U.S.C. § 7479(1). The amount of contaminants Longleaf would spew into Early County’s air far exceed the PSD thresholds.

potential emissions of all pollutants regulated under the Clean Air Act.

Among other requirements, the Act imposes stringent emission limits limitations on new major sources of air pollution based on the emission limitations that would be possible if the “best available control technology” were incorporated into the design and construction of the facility. Specifically, a “new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.” 40 C.F.R § 52.21(j)(2); *see also* 42 U.S.C. § 7479(3). The Georgia SIP incorporates 40 C.F.R § 52.21(j) by reference. Georgia SIP, 391-3-1-.02 (7)(b)(7).

This requirement that the “best available control technology” be utilized gives rise to one of the more oft-used acronyms in air quality law – BACT, which is short for “Best Available Control Technology.” BACT is defined as follows:

The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy,

environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3).

While BACT in a particular case, in its final form, is an emissions limitation, the process by which that limitation is determined is of particular significance here. To determine the appropriate permit conditions, the permitting agency must first go through a process to determine what *technology* meets the statutory definition of BACT. Once that technology is determined, the emissions limit is calculated based on that “best available” technology. A facility need not install the specific technology designated as the “best available,” but if it does not, it must utilize technology that will meet the emission limitations that the best available control technology would achieve. Those limitations must be prescribed in a PSD permit.

It is of the utmost importance that the agency properly determine the technology that fits the statutory scope of BACT, and that no effective

technologies be arbitrarily excluded from consideration. If an available technology with a greater capacity to remove pollutants is omitted from consideration, the final emissions limits will suffer since they would be based on less effective technology. A small change in permit emission limits can mean a difference of thousands of tons of pollutants in the air.

In addition to the BACT requirements for a particular permit, an applicant for a proposed source must affirmatively demonstrate that the source will not cause or contribute to air pollution in violation of any national ambient air quality standard in any area. 40 C.F.R. § 52.21(k) (incorporated by reference in Georgia Rules 391-3-1-.02(7)(b)(8)).

SUMMARY OF THE CASE

This case involves the legality of a permit that would allow the construction of a massive new source of air pollution, the first coal-fired power plant proposed for Georgia in over twenty years. The plant, known as the Longleaf Energy Station (“Longleaf”) would, if built, be located in Early County, Georgia and annually emit 8 to 9 million tons of carbon dioxide (“CO₂”); thousands of tons of sulfur dioxide (“SO₂”); nitrogen oxides (“NO_x”); coarse particulate matter (“PM₁₀”); fine

particulate matter (“PM_{2.5}”); sulfuric acid mist; and a number of other hazardous air pollutants, including mercury.

These pollutants are known to cause many grave health and environmental impacts. For example:

SO₂ interacts with water (H₂O) to create sulphur oxide based acids. It causes acid rain and is the primary cause of poor visibility conditions east of the Mississippi, among other noxious effects. It is “[a] highly reactive colorless gas smelling like rotten eggs’ that ‘at elevated concentrations in the ambient air . . . directly impairs human health.’” *LaFleur v. Whitman*, 300 F.3d 256, 270 (2nd Cir. 2002)(quoting *American Lung Ass’n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). SO₂ is particularly dangerous to asthmatics. 61 Fed. Reg. 25,566 (May 22, 1996).

Nitrogen oxides (“NO_x”) are a key precursor to smog. In combination with water, NO_x also form nitrogen oxide based acids. Forms of NO_x cause acute respiratory illness in young children and diminished pulmonary function in school-age children. 50 Fed. Reg. 25,532 (June 19, 1985).

Particulate matter, and especially fine particulate matter (PM_{2.5}) is associated with, among other things, premature death and reduced

mortality; respiratory and cardiovascular disease; changes in lung function and increased respiratory symptoms; changes to lung tissues and structure; and altered respiratory defense mechanisms. 62 Fed. Reg. 38,652, 38,656 (July 18, 1997). Particulate matter also contributes to the formation of harmful low-level ozone and diminished visibility. 62 Fed. Reg. 38, 679 (July 18, 1997). Fine particulate matter refers to material emitted into the atmosphere that is smaller – *i.e.*, “finer” – than 2.5 microns (a micron is one thousandth of a millimeter). Such fine particulate matter is designated as PM_{2.5}. *S. Camden Citizens in Action v. N.J Dep’t of Env’tl. Prot.*, 2006 U.S. Dist LEXIS 45765, *12 (D.N.J. 2006). “This fine particulate matter causes grave health hazards because they are so small that they can get deep into people’s lungs and some may even get into people’s bloodstreams.” *Id.*

The decision of the EPD to permit Longleaf was flawed because of a number of fatal deficiencies in both the permit and the permitting process. First, the Superior Court properly held that the ALJ effectively abdicated the legal

responsibility assigned to OSAH in this case by refusing to examine the evidence before it *de novo*. The Superior Court “carefully reviewed the final decision of the ALJ” and based on that review found that “it is clear that the ALJ did not make *de novo* findings or decisions concerning emission limitations or other issues.” Sup. Ct. Order, 39-R-19188. Instead, the ALJ improperly deferred to the factual assertions and conclusions of EPD, in derogation of the laws that governed the proceeding. *Id.* at 19188-90. As such, the Superior Court properly remanded the matter back to the ALJ for a determination under the correct standard of review. *Id.* at 19203.

Substantively, serious errors occurred in connection with the specific air pollutants at issue. First, neither Energy Associates nor EPD performed any assessment at all of the *fine particulate matter* (PM_{2.5}) the plant would emit, notwithstanding the known health hazards of that pollutant. They maintain no such assessment was necessary even though the PM_{2.5} analysis by Petitioners’ expert was *uncontraverted*, and his analysis shows that the plant, if built, would exceed the ambient air quality standard for PM_{2.5} in violation of the Clean Air Act. 2-R-568; 3-R-1187; 3-R-1184. The Superior Court correctly ruled that the ALJ erred

as a matter of law by refusing to consider this evidence that the PM_{2.5} standard would be violated.

Second, the ALJ erred by not requiring EPD to impose any emission limit for carbon dioxide since the law dictates that such limits must be imposed for each “pollutant” that is subject to regulation under the Clean Air Act. CO₂ is clearly such a pollutant.

Third, the law requires EPD to set emission limits for new facilities based on the maximum degree of reduction that is achievable from either pollution control equipment, alternative production processes, or “innovative fuel combustion techniques.” 42 U.S.C. § 7479(3). Nevertheless, EPD refused to consider any alternative production processes or “innovative fuel combustion techniques” here, in spite of the fact that there is established technology that could have achieved better, more stringent emission levels. EPD’s failure to even assess the utility of that technology should be fatal to the permit, and the ALJ erred in ruling otherwise. ALJ Order, 8-R-3524.

During the administrative proceedings, the ALJ also dismissed some of Appellees’ claims – without even considering evidence on those claims – under the

notion that a party cannot contest a permit limitation unless the challenger first asserts in its petition the specific emission limit that a “proper” permit would have included. ALJ Order, 7-R-3489-90. Because Appellees were unable to do that on certain issues, the ALJ dismissed those claims. *Id.* The Superior Court recognized that, under Georgia’s liberal pleading standards, a claim should not be dismissed for failure to comply with such “pleading contrivances.” 39-R-19200.

There were also other process problems during the administrative proceedings. The ALJ refused to allow Appellees to amend their petition although the underlying facts necessary to challenge a newly discovered flaw in the permit were under the control of EPD and did not become available until late in the proceedings. That claim involved the requirement that EPD impose PSD emission limits only based on a reasonable and sufficient analysis. 40 C.F.R. § 52.21(b)(12); Georgia SIP 391-3-1-.02(7)(a)(2). That requires the work of a professional engineer. O.C.G.A. § 43-15-7. Here, as found by the Superior Court, EPD did not have a professional engineer performing or overseeing the engineering analyses that were the basis of the permit’s emission limits. Noting that inadequate analyses would endanger public health, the Superior Court

directed, on remand, that the permit be issued utilizing “sufficient engineering assistance and direction to ensure that” the emission limits comply with the law. 39-R-19203.

PART TWO

ARGUMENT AND CITATION OF AUTHORITIES

A. The Superior Court Correctly Held That the Clean Air Act Requires That the CO₂ Emissions from the Proposed Plant Be Evaluated and That the PSD Permit Include Appropriate CO₂ Limits (Enumeration No. 1).

The Superior Court made a succinct ruling of law based on the clear command of the governing federal statute. As they had below, Energy Associates argues about everything *except* what is actually at issue here.

1. *The Governing Legal Framework and the Ruling of the Superior Court.*

While Energy Associates tries to create the impression that the Superior Court’s CO₂ ruling is out of synch with other jurisdictions, conspicuously absent is citation to even *one single contrary judicial decision*. More fundamentally, Appellant’s contention cannot be squared with the plain language of the governing statute.

A brief history of “CO₂ regulation” makes it clear why this legal issue has not been before the courts previously, and why Appellant is dead wrong in its *legal* contention. For some years, EPA contended that CO₂ was not an “air pollutant” under the Clean Air Act. If that were the law, of course, there would be no CO₂ issue in this case. Appellant proceeded through the administrative process here in the hope that the United States Supreme Court would uphold the EPA position on this issue; but it did not. On April 2, 2007, the Supreme Court held that CO₂ is a “pollutant” within the coverage of the Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

Faced with that decision, Appellants could either redo the administrative process with a proper CO₂ analysis and then include CO₂ limits in the permit. Or they could forge ahead, fabricate some new rationale for ignoring CO₂ emissions, and hope some court would give them a “pass.” They choose the latter course, and the Longleaf permit was then issued just days after *Massachusetts v. EPA* was decided. As a result, Appellants have been forced to advocate a construction of the law that is completely untenable in light of (1) the plain wording of the governing statute and (2) the regulations that implement that statute.

Energy Associates steadfastly tries to obfuscate this issue by arguing about what is not before the Court. Appellants proclaim, for example, that the instant CO₂ issue under the Clean Air Act is really not a legal issue, but “a political question that must be resolved through legislative and administrative processes.” Energy Assoc. Brf., p. 26, note 8. The issue debated in Washington, however, is completely distinct from the *legal issue* that is before this Court. Washington has been discussing what *national CO₂ standards* should be imposed to address global warming. The instant legal issue has nothing to do with such national standards (NAAQS). It involves what emission limits for regulated air pollutants should be included in a permit for a major new emitting source. That issue has nothing to do with what national standards Congress or the EPA may impose.

The Clean Air Act includes a number of regulatory programs to protect the nation’s air resources. 42 U.S.C. § 7401(b)(1). Some of those regulations prescribe the National Ambient Air Quality Standards (NAAQS), which are national limits for a very few specific pollutants. *See* 40 C.F.R. pt. 50. Many of the regulations under the Act, however, regulate other pollutants under different regimes. *See* Sup. Ct. Order, 39-R-19186-87. Because Early County is an

“attainment area” where prescribed NAAQS limits are met, like Longleaf must receive a prevention of significant deterioration (PSD) permit. As discussed above, *supra* at 4-7, this “major emitting facility” must therefore comply with emission limits based on the “best available [pollution] control technology” (BACT), which is defined as follows:

The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. 42 U.S.C. § 7479(3).
Sup. Ct. Order, 39-R-19187-89.

What *is* at issue here are air pollutants that are subject to BACT

determinations for new major emitting facilities. What *is not* at issue is whether CO₂ is subject to a current national ambient air quality standard (NAAQS). On that latter point, there is no question – CO₂ is *not* subject to a NAAQS. As to the former question, however, it is equally clear that CO₂ *is* definitely a “pollutant subject to regulation” that must be included, by the clear command of the statute, in BACT determinations for a new “major emitting facility” like Longleaf.

The Superior Court’s holding on this point is straightforward and plainly commanded by the law:

The ruling of the ALJ can be upheld on this issue only if carbon dioxide is not an air “pollutant subject to regulation under the Act.”

Otherwise, the statute requires a BACT emission limit for CO₂....

Faced with the ruling in *Massachusetts* that CO₂ is an “air pollutant” under the Act, Respondents are forced to argue that CO₂ is still not a “pollutant *subject to regulation* under the Act.” Respondents’ position is untenable. Putting aside the argument that any substance that falls within the statutory definition of “air pollutant” may be “subject to” regulation under the Act, there is no question that CO₂ is

“subject to regulation under the Act.”

Respondents acknowledge, for example, that the regulatory regime under the Clean Air Act mandates monitoring of CO₂ emissions. The failure to conduct required monitoring under the Act’s regulations is subject to criminal sanction, and a person who knowingly submits false monitoring reports may be subject to a felony prosecution. *See, e.g.*, 42 U.S.C. § 7113(c)(2); 18 U.S.C. § 1001. . . .

In addition to the CO₂ monitoring regulations in Part 75 of Title 40 of the Code of Federal Regulations, Petitioners have provided the Court with many other examples of Clean Air Act regulations that address CO₂. Respondents effectively ignore these regulatory structures by contending that BACT limits should apply to a pollutant only if it is also capped or controlled by some other general limit. . . . Longleaf Brief, p. 38. The BACT statute is plainly broader than that, however, encompassing all pollutants that are “subject to regulation” under the Act, whether or not they are independently subject to NAAQS or other general limits. The ALJ clearly erred, in light of the

regulatory schemes that in fact address CO₂ in stating that “EPA has not promulgated a [NAAQS] for CO₂, has not listed CO₂ as a regulated pollutant in any section of the CAA, *and has not established any other regulations for CO₂.*” Sup. Ct. Order, 39-R-19190-94 (Italics added).

The Court’s reference to the “many other examples of Clean Air Act regulations that address CO₂” is a reference to a 128-page compilation that Petitioners submitted that listed *hundreds of CO₂ regulations that the EPA has adopted under the Clean Air Act.* See 37-R-18481-611. Given the plain command of the statute – that BACT determinations and emission limits be performed for all pollutants that are “subject to regulation under the Act” – there can be no legitimate question at all that *the statute* mandates that BACT-based emission limits should have been included for CO₂.

2. Appellant’s Regulatory Argument.

In its effort to circumvent the law, Appellant simply ignores the statute and, instead, discusses the EPA’s regulatory definition of “NSR pollutant.” Energy Assoc. Brf., at 15-16. That regulatory argument, however, does not advance

Appellant's position one whit. As the Superior Court noted, all parties in this action "agree that a BACT analysis and emission limitation is required for all 'registered NSR [new source review] pollutants.'" 39-R-19192. The regulatory definition of such "regulated NSR pollutants" includes four separate categories, the first three of which no one has ever contended include CO₂. It is the fourth category on which Appellant stumbles, as it reiterates the broad statutory sweep that "*any pollutant* that otherwise is *subject to regulation* under the Act" is a regulated NSR pollutant. 40 C.F.R. § 52.21(b)(50)(iv). As such, there is no question that a pollutant "subject to regulation under the Act," like CO₂, is subject to the BACT requirements under the dictates of the regulations, just as under the statutory command.

Appellant urges this Court to give this regulation a contorted interpretation that would repeal the underlying statutory provision. As the Superior Court held, however:

Limiting BACT determinations to those air pollutants for which there is a separate, general numerical limitation effectively ignores part (iv) of the regulation that sweeps in all pollutants that are "otherwise

subject to regulation under the Act.” Since CO₂ is “otherwise subject to regulation under the Act,” a PSD permit cannot issue for Longleaf without CO₂ emission limitations based on a BACT analysis. 39-R-19193.

3. *Appellant’s Other Arguments.*

The other arguments Appellant advances in support of its position show how far afield it must go in its effort to spin a theory to support its position. Appellant points to one of the hundreds of CO₂ regulations – one pertaining to CO₂ monitoring – and claims it was enacted under the authority of a congressional enactment that was not formally “codified into the [Clean Air Act].” Energy Assoc. Brf., p. 21. The specific federal law Appellant points to is Section 821 of the vast, several hundred page amendments to the Clean Air Act that were passed in 1990 as U.S. Pub. Law 101-549. At the outset, whether a particular federal enactment is actually indexed in the U.S. Code has no impact on its force and effect. Moreover, the 1990 enactment at issue expressly contravenes Appellant’s position, as it begins with the following self-descriptive words: “An act to amend the Clean Air Act”

Were there the slightest question concerning this issue, one need merely look at the CO₂ regulations themselves. There, the issuing agency, the EPA, *expressly* states that the CO₂ monitoring regulations were enacted under the Clean Air Act, including the referenced Section 821 of the 1990 amendments. These regulations are set forth in 40 C.F.R. Part 75, and the very first regulation therein, § 75.1(a), states that the “purpose of this part” of the regulations is to implement “sections 412 and 821 of the Clean Air Act, 42 U.S.C. § 7401-7671q as amended by Pub. Law 101-549.”

Appellant’s “Section 821” argument is clearly specious. It is also irrelevant since it does not even address the *hundreds* of other CO₂ regulations promulgated by the EPA that were before the Superior Court, each of which was expressly issued under the authority of the Clean Air Act. *See Clean Air Act Regulations that Address Carbon Dioxide, 37-R-18481-611.*³

³ While this compilation includes only portions of the regulations because of the bulk (the excerpts alone ran well over 100 pages), each and every one of these hundreds of regulations includes, in its full text, an explicit statement by EPA that it was issued under the Clean Air Act.

Next, and once again ignoring what the controlling statute says, Appellant turns again to the EPA regulation, 42 C.F.R. § 52.21(b)(50)(iv), and claims that the Georgia EPD and the EPA have “interpreted” this regulation to mean that CO₂ is not “otherwise subject to regulation.” Putting aside the fact that neither EPD nor EPA can repeal a federal statute through an administrative action, the fact is that neither agency has ever rendered any such interpretation. Appellant confuses the parties’ litigation positions with real “agency interpretations” which, in some instances, may bear on the construction of a regulation or statute. As to EPD, neither Energy Associates nor EPD can point to one scrap of paper in which EPD duly attempted to interpret this language. That EPD has made no independent interpretation of this provision is hardly surprising since, as noted above, EPD’s PSD “regulations” simply incorporate EPA’s regulations by reference.

As for EPA, its own Environmental Appeals Board (“EAB”) has just rendered a decision that eliminates Energy Associates’ argument. In response to the same argument, the EAB ruled that the agency has *never* endorsed the interpretation that Energy Associates asserts. *See, In re Desert Power Cooperative*, PSD Appeal No. 07-03, 2008 WL 4921265 (E.P.A.) (EAB Nov. 13,

2008). By law, the EAB acts like the “Supreme Court of the EPA.” Its rulings are definitive as to EPA actions. 40 C.F.R. § 1.25(e). In the *Deseret Power* appeal, EPA asserted as a litigation position the same “regulatory argument” Energy Associates advances here – namely, that the agency supposedly had, historically, construed the “subject to regulation” phrase not to include CO₂. The Appeals Board found the argument groundless:

[W]e conclude that the Region’s rationale for not imposing a CO₂ BACT limit in the Permit – that it lacked the authority to do so because of an historical Agency interpretation of the phrase “subject to regulation under this Act” as meaning “subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant” – is not supported by the administrative record as defined by 40 C.F.R. § 124.18.

Deseret, supra, slip op. at 63. The EAB determination on this issue being a final and binding adjudication of what the EPA’s position has been, Energy Associates’ contrary contention is precluded as a matter of law.⁴

⁴ Appellees would also note that the EAB rejected the “Section 821” argument that Energy Associates relies upon. *See supra* at 23-24. The EAB held that the Section

Energy Associates *ejusdem generis* argument is also meritless. See Energy Assoc. Brf., pp. 24-25. It is nothing but a rehash of its “regulation argument,” which fails for the reasons already discussed. The *ejusdem generis* argument was also discussed and rejected by the EPA Appeals Board in the *Deseret* decision. *Deseret* slip op. at 45-46. Among other things, the EAB noted that even a real administrative interpretation of a regulation receives little or no weight where the regulation merely “parrots” the language of the statute, as here, and the issue is what the statute means:

The existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation, but the meaning of the statute. An agency does not acquire special authority to interpret its own words, when it has elected merely to paraphrase the statutory language.

Id. at 46, quoting from *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006).

821 argument is “at odds with the Agency’s prior statements regarding the relationship between section 821 and the CAA, including statements in EPA’s Part 75 regulations.” *Deseret*, slip op. 83 & 55-63.

4. *Appellant's Arguments of Disruption are Groundless.*

Appellant suggests that the Superior Court's CO₂ ruling would be disruptive by requiring BACT determinations for CO₂ for "schools, hospitals, small businesses, and many other entities" that had not been covered before. Energy Assoc. Brf., p. 26. While Appellees do not know what kind of similar claims will be made by Amici briefs Appellants may solicit, we know the character of the claims that were made by Appellants' Amici in connection with the applications for discretionary review. There, the Chamber of Commerce gave a long litany of disingenuous claims of "doom and gloom" that might result from the Superior Court's ruling. (Brief of Amici Chamber of Commerce, et al., July 30, 2008).

All of those representations were gross exaggerations. In fact, Appellant's assertion that "facilities across the state, including schools, hospitals and small businesses" will be adversely affected, ignores what the Court held and what the governing law states. The statute *categorically excludes* all "nonprofit health and education institutions" which Georgia opts to exempt. 42 U.S.C. § 7479(1). The Chamber's even more hysterical assertions of "economic chaos" and a "permitting quagmire" are flagrant fictions. For one thing, the PSD requirement only applies

to “sources” that emit more than *250 tons* of pollutants per year. 42 U.S.C. § 7479(1). And to the extent that some additional entity might require a PSD permit, the permitting process would bear no resemblance to the complex process necessary for the *uniquely massive* polluter before the Court in this case.

As EPD’s own website states: “Georgia’s environmental regulations require many small businesses [*fewer* than 100 employees] to obtain permits, install pollution control equipment, and maintain required emissions records.”

<http://www.gasmallbiz.org/>. Hundreds of “minor NSR permits” for businesses *smaller* than the ones Amici mention already issue under the Clean Air Act without difficulty. See <http://www.epa.gov/nsr/minor.html>. The Chamber cited the possible inclusion of “bakeries” under the Act as its supposed “conclusive proof” that the Court’s ruling would have cataclysmic consequences, and thus must be wrong. But bakeries already obtain air pollution permits because they emit “volatile organic compounds,” <http://www.epa.gov/ttn/chief/eiip/techreport/volume03/bakeries.pdf>, and there is certainly no shortage of bakeries in Georgia.

The Chamber would like this Court to believe that “the world will stop” if

the law is applied according to its terms, *but BACT requirements do not prohibit anything from being built*. By its express terms, BACT is a practical requirement that takes into account “economic impacts and other costs.” 42 U.S.C. § 7479(3). To the extent that any new permit processing were required for lesser projects than Longleaf, one can be certain that standard, simple administrative procedures would address such routine matters. As mandated by the Clean Air Act, EPD has long maintained a program to assist small businesses in “permitting, installation of pollution control equipment,” etc. *See, e.g.*, EPD website, *supra*. Contrary to the Chamber’s unsupported assumption that routine PSD permits would not be processed routinely, the law, history, and present practice all make it clear that PSD permits for more routine matters would be easily processed.

B. The Superior Court Correctly Ruled That Federal Law Required a Full BACT Analysis for the Alternative Fuel Combustion Technique That Uses an Integrated Gassification Combined Cycle (IGCC). (Enumeration No. 2).

1. *Appellant’s Argument Before this Court Ignores Both the Controlling Law and What the Superior Court Actually Held.*

The Superior Court held that the IGCC process (short for “Integrated Gassification Combined Cycle”) is the kind of less-polluting alternative fuel

combustion process that the Clean Air Act requires to be evaluated as part of a complete BACT analysis. The issue here is not what kind of actual combustion process might ultimately be built. Rather, the sole question is the scope of the analysis required in order to determine the emission limits that would be attained using the “best available control technology.” Since that analysis was never done, Appellants are precluded from suggesting to this Court that their proposed design achieves the stated objectives of the Act.

Appellant contends that the Superior Court erred in so holding, but in advancing its argument, Energy Associates virtually ignores the Superior Court’s analysis. When one looks at the *actual laws* and *actual regulations* that govern this issue, it is clear that the Superior Court ruled correctly. Rather than start with the controlling statutory provision, Energy Associates’ entire argument instead complains that consideration of IGCC would require “redesigning” the power plant and that it would “redefine the source.” Energy Assoc. Brf., pp. 27-33. In the same vein, Appellant insists that the BACT analysis can never require an applicant to consider any “source” other than “as the applicant has defined it.” *Id.* at 29. But if it were true that the scope of BACT were actually determined by exactly what

the Applicant proposes, the notion of “alternative” technologies would be effectively eliminated. Rather than “uncritically accept” some kind of “unprecedented” theory, Energy Assoc. Brf., pp. 30-33, 35, the Superior Court simply read and applied the BACT statute by its terms. It is that which Appellant refuses to do.

Indeed, in this very case, the IGCC alternative is the very same technology that the EPD had first ruled, when it previously rejected the permit application for Longleaf, must be evaluated under BACT in setting emission limits. 39-R-18901. Moreover, IGCC combustion is the very technology that is explicitly identified in the statute and implementing regulations that dictate the range of technologies that must be considered in cases like this one. *See* 42 U.S.C. § 7479. The Superior Court first stated the undisputed facts as follows:

The Longleaf plant as proposed would consume coal to generate electricity. Under Longleaf’s proposed design, the coal would be burned in a boiler; the heat from the boiler would generate steam; and that steam would drive a turbine, which, in turn, would drive a generator to generate electricity. The IGCC technology (integrated

gasification combined cycle) is a different way of using the coal to generate heat to drive the turbines. 40 C.F.R. § 60.41Da. IGCC works by first converting the coal to a gas - called “gasification” - and then burning the gas to drive turbines both directly from the hot gas and from steam, which again is created by the heat of combustion. And once again, the turbines drive the generator to create electricity.

39-R-19197. The Superior Court then stated Energy Associates’ position as the company argued it below:

Respondents argue that they are not required by the BACT statute and regulations to do a full analysis of IGCC combustion technology, and that the permit limitations need not incorporate lower pollution limits that would occur if IGCC were used. Longleaf advances this argument, which was accepted by the ALJ, by focusing not on the overall proposed plant, but on just one aspect of the facility. *At the hearing, Longleaf argued that the legal analysis here should focus only on the proposed “boiler,” not on the “facility,” which is a much broader term.*

39-R-19197. The Superior Court went on to reject that contention as a matter of law:

Respondents' approach is too narrow and cannot be squared with the provisions of the law that control the Court's decision on this issue. The BACT statute is explicit in this regard. It requires a BACT analysis and permit emission limitations based on the "emitting facility" as a whole. 42 U.S.C. § 7479(3). In addition, the statute was amended in 1977 to require, as part of the BACT analysis, consideration of "innovative fuel combustion techniques." IGCC is an "innovative fuel combustion technique."

The proposed "major emitting facility" is still the same kind of statutorily defined "facility" under the Clean Air Act whether the coal is burned directly in a boiler or is first converted to gas and then burned to create the heat of combustion that drives the turbines. The ALJ erred in ruling that IGCC would "redefine the air pollution source" so that it need not be part of the BACT analyses. (Final Decision, pp. 8-9). Under the statutory definition, one kind of "major

emitting facility” is a “fossil-fuel fired steam electric plant.” 42 U.S.C. § 7479(1). With or without IGCC technology, the Longleaf plant thus falls under the same “facility” definition - a “fossil-fuel fired steam electric plant.” The regulatory definition supports this conclusion. It provides:

Integrated gasification combined cycle electric utility steam generating unit or IGCC electric utility steam generating unit means a coal-fired electric utility steam generating unit that burns a synthetic gas derived from coal in a combined-cycle gas turbine.

40 C.F.R. § 60.41Da.

While the statute and regulation are clear on their face, the Court would also note that the proponent of the 1977 amendment that added the BACT language at issue addressed this specific question on the Senate floor. In his explanation to the Senate concerning the amendment, Senator Huddleston explained that, while he believed BACT already included “such technologies as ... gasification,” the

amendment was added nevertheless “to be more explicit, to make sure there is no chance of misinterpretation.” 123 Cong. Rec. S. 9434-35 (June 10, 1977).

39-R-19197-99. The Superior Court’s analysis simply tracks the controlling statutory language, which is buttressed by legislative history. The words of the statute permit no other result, which likely explains why Appellant effectively disregards the statute itself.

2. *Appellant’s Arguments Persistently Disregard the Controlling Law Concerning BACT and the IGCC Issue.*

Appellant literally ignores what the Superior Court held; what the controlling **statute** says; the regulations relied upon by the Superior Court; and the legislative history behind the congressional enactment at issue. In addition, Appellants are forced to hang their hat on a theory that would effectively gut BACT analyses by eliminating from consideration any alternative approach that was not part of the Appellant’s own proposed design, Energy Assoc. Brf., p. 29-30. That approach would allow an applicant to unilaterally dictate the confines of BACT.

Appellant's argument hinges on the view that a BACT analysis of the proposed facility with an IGCC combustion process would render the entire project a completely different and distinct "source." *Id.* As the Superior Court noted, Energy Associates equated "source" with the plant's "boiler" in its arguments below. If the boiler is changed, so goes Appellant's argument, BACT cannot apply. That is so, we are told, notwithstanding the statutory mandate that alternative *fuel combustion* technologies such as gasification be considered as part of the BACT analysis. Only by ignoring the statutory mandate can Appellant advance its argument.

The statute that dictates the scope of the BACT analysis clearly encompasses a much broader universe of alternative technologies than what Energy Associates urges. The "best available control technology" that *must* be considered is *not* limited just to the specific design and configuration proposed by the developer. Instead, the statutory requirement specifically encompasses the entire proposed *facility*, however it may ultimately be constructed and configured:

The term "best available control technology" means an emission limitation based on the *maximum degree of reduction of each*

pollutant subject to regulation under this Act emitted from or which results *from any major emitting facility*, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is *achievable for such facility through* application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or *innovative fuel combustion techniques* for control of each such pollutant.

42 U.S.C. § 7479(3)(emphasis added). Thus, BACT requirements explicitly include exactly the kind of fuel combustion technology reflected by IGCC as a design variant for a new “major emitting facility.” *Id.*

Appellant also ignores the statutory definition of what constitutes a “major emitting *facility*” that is subject to BACT determinations. That definition provides: The term “major emitting facility” means *any* of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of

stationary sources: *fossil-fuel fired steam electric plants*
of more than two hundred and fifty million British
thermal units per hour heat input . . .

42 U.S.C. § 7479(1) (emphasis added). The Superior Court’s ruling was hardly an “uncritical” adoption of some new theory. Rather, the Superior Court simply applied the plain words of the statute, which Appellant stubbornly refuses to acknowledge. No schematic drawings that Appellant might concoct, *id.* at 32, can change that basic fact.

There can be no question under the statutory definition that a proposed new "major emitting *facility*" includes the proposed plant even if it is reconfigured to include IGCC combustion technology. The facility as proposed by Energy Associates is admittedly a “fossil-fuel fired steam electric plant” with coal as the fuel. Energy Assoc. Brf., p.27 & note 9. It is equally true that the plant would remain a “fossil-fuel fired steam electric plant” if the coal is first fed into an IGCC or “coal gasification” process. In both instances, the plant, its design, its function, and its fuel indisputably constitute a “major emitting facility” that is a coal-fired electric generating facility. Under the statutory definition of what constitutes a

“major emitting facility,” the facility here remains the same legal entity for BACT – namely, a fossil-fuel fired steam electric plant. To maintain its argument, Appellant is forced to argue that an IGCC plant would be two separate “facilities.” Energy Assoc. Brf., p. 27 & note 9. The problem with that argument is that it is divorced from the statutory and regulatory definitions.

Appellant also assumes, wrongly, that the word “source” in the regulation it cites means something different than the statutory definition of a “major emitting facility.” Focusing on a different word in a regulation, of course, cannot change the meaning of the underlying statute. But even if the proposed plant were considered only a “source” and not a new “facility,” Appellant would end up in the same quandary because the definition of “source” leads to the same conclusion. The regulatory definition of “stationary sources” includes as one category “Electric Utility Steam Generating Units.” 40 C.F.R. Part 60, Subpart Da (§§ 60.40Da-.52Da). There is no distinction - in the definition of this “source” - between a coal fired electric power plant that burns pulverized coal directly, and one that consumes coal that is first fed into an IGCC “combined-cycle gas turbine.” To the contrary, the regulations explicitly lump together, as one, both methods of

generating electricity using coal as the basic fuel:

Integrated gasification combined cycle electric utility steam generating unit or ***IGCC*** electric utility steam generating unit ***means a coal-fired electric utility steam generating unit*** that burns a synthetic gas ***derived from coal*** in a combined-cycle gas turbine.

40 C.F.R. § 60.41Da. IGCC is simply one kind of “coal-fired electric utility steam generating unit.” While Appellant tries to claim differences between a pulverized coal plant and an IGCC plant, the EPA's regulatory definitions do the opposite. They include IGCC and pulverized coal burning in the exact same source category, “coal-fired electric utility steam generating units.” That rule definition precludes Appellant’s attempts to make factual distinctions as a matter of law.

3. Energy Associates’ “Deference” Argument Is Misplaced.

Energy Associates argues that this Court must accept its position on this issue because this Court “must afford deference to an agency’s interpretation of the statutes and regulations that it is charged with administering.” Energy Assoc. Brf., p. 35. While this statement is partly consistent with U.S. Supreme Court’s discussions of statutory interpretation, *see Chevron U.S.A. Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court has made it clear that, when *statutory* language as opposed to *regulatory* language is at issue, deference is appropriate only when the agency's interpretation has been enunciated in a format which itself has the force of law. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (Interpretations of a statute in an opinion letter, policy statement, agency manual, or enforcement guidelines, all of which "lack the force of law," are not entitled to *Chevron* style deference.). An agency's formal interpretation of *regulatory* language is entitled to deference, *Auer v. Robbins*, 519 U.S. 452 (1997), but not if the regulation merely parrots statutory language, as here. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

As in *Gonzales*, the key language at issue here derives from congressional, not agency, language. The definition of BACT in the regulations is adopted almost whole cloth from the statute, and the substitution of the word "source" for the word "facility" in the regulations shows no intention to limit the scope of the BACT analysis – nor could it do so since EPA is powerless to change the import of the statute.

Thus, to the extent this Court might look to secondary sources as an aid to

interpret the BACT definition, it should look to *legislative* history as did the Superior Court. Congress added the “innovative combustion techniques” language to the BACT definition by a floor amendment offered by Senator Huddleston of Kentucky, whose express purpose was to make it clear that technology like IGCC be included in BACT alternatives. The Senator specifically mentioned gasification technology in explaining his amendment:

Mr. HUDDLESTON. . . . The definition in the committee bill of best available control technology indicates a consideration for various control strategies by including the phrase "through application of production processes and available methods systems, and techniques, including fuel cleaning or treatment." And I believe it is likely that the concept of BACT is intended to include such technologies as low Btu *gasification* and fluidized bed combustion. But, this intention is not explicitly spelled out, and I am concerned that without clarification, the possibility of misinterpretation would remain.

It is the purpose of this amendment to leave no doubt that in determining best available control technology, all actions taken by the fuel

user are to be taken into account - be they the purchasing or production of fuels which may have been cleaned or up-graded through chemical treatment, *gasification*, or liquefaction; . . .

The purpose, as I say, is just to be more explicit, to make sure there is no chance of misinterpretation.

123 Cong. Rec. S9434-35 (June 10, 1977).

C. The Superior Court Correctly Held That the ALJ Erred by Refusing to Consider Relevant Evidence on the Issue of Particulate Matter, PM_{2.5} (Enumeration No. 3).

There are two separate and distinct National Ambient Air Quality Standards (NAAQS) for particulate matter. One is for PM₁₀, which governs particles that are 10 microns or less in diameter. The other NAAQS standard is for PM_{2.5}, which governs particles that are less than 2.5 microns in diameter. 40 C.F.R. §§ 50.6 & 50.7; Sup. Ct. Order, 39-R-19193. Issuing a permit if the plant would cause or contribute to a violation of either particulate standard is *illegal* under the Clean Air Act.

It is undisputed that the separate, additional PM_{2.5} limit was added after it became known that this very smallest kind of pollutant was especially harmful to

human health.

PM₁₀ has long been one of the pollutants for which there has been a national, or NAAQS, standard. Based on studies concerning the adverse health impacts of very small particulate matter, the EPA in 1997 also promulgated a separate NAAQS requirement for PM_{2.5}. *See* 62 Fed. Reg. 38,652 (July 18, 1997). The EPA found the new PM_{2.5} standard necessary because of health risks that included “premature mortality and increased hospital admissions and emergency room visits ... ; increased respiratory symptoms and disease, in children and individuals with cardiopulmonary disease such as asthma; decreased lung function, particularly in children and individuals with asthma; and alterations in lung tissue and structure and in respiratory tract defense mechanisms.” *Id.* The PM_{2.5} NAAQS was made even more stringent in 2006 because of additional health risk studies. Sup. Ct. Order, 39-R-19193-94.

In its appeal on the PM_{2.5} issue, Energy Associates once again ***completely*** misstates what the issue is, the state of the record, and what the Superior Court

actually held. For example, Appellant claims that “the Superior Court held that the surrogate approach is not sufficient as a matter of law.” Energy Assoc. Brf., p. 38. In fact, the Superior Court did no such thing. Similarly, Appellant asserts that the Court “proclaims to know better” than “technical experts” and “substituted its own technical judgment” for that of the agencies. *Id.* at 38, 41. Again, the Superior Court did neither. Energy Associates also complains that the Court “required Longleaf to demonstrate [PM_{2.5} emissions] in a particular way;” that the Court afforded “absolutely no deference” to the agencies involved; that the Court’s ruling somehow “creates a catch 22” and “grave uncertainty” and permits “no defense to challenges like those asserted” here. *Id.* at 41-44. These wild assertions are equally divorced from the record and what the Superior Court actually held.

In fact, all the Court held is that the ALJ cannot decide the PM_{2.5} issue without considering the evidence that was before it. No principle of law is more basic. Unsurprisingly, Appellant cites no case that would remotely indicate that the Superior Court’s holding was erroneous. Incapable of finding anything wrong with the Court’s actual holding, Appellant argues about everything else imaginable, none of which was part of the Court’s decision.

1. *What the Superior Court Held, and What the Superior Court Did Not Hold, Are Very Different Than What Appellants Argue About.*

The Court's ruling is narrow, based on the undisputed facts in the record, and conflicts with no regulatory "guidance" of any sort. Because PM_{2.5} is an air pollutant that is subject to NAAQS, it is undisputed that Longleaf was required to prove that the PM_{2.5} national standard would not be exceeded as a result of the plant's construction. That is a requirement of any PSD permit in an attainment area like Early County. *See* 42 U.S.C. § 7475(a). Thus, if the ALJ had found – based on the evidence in the record – that PM_{2.5} emissions from Longleaf would cause the National Standard (NAAQS) for PM_{2.5} to be exceeded, the ALJ would have been required by law to reject the permit without a reduction in PM_{2.5} emissions.

The issue in this case is whether the ALJ properly determined whether this undisputed principle of law was or was not satisfied here. While Appellant argues that the "surrogate theory" should have required judgment in its favor, it misstates the issue that is before the Superior Court. As the Court below noted, Appellees never contended that the "surrogate approach" could never be used, and the Court did not hold that it was irrelevant or "inadequate as a matter of law," as Appellant

claims. What the Superior Court actually said about the surrogate issue is the following:

The so-called surrogate approach uses modeling for PM₁₀ emissions to examine PM_{2.5} compliance. EPA "guidance" has been written that allows a surrogate approach in some circumstances. Petitioners do not contend that the use of a PM₁₀ surrogate evaluation is never appropriate. For example, Respondents rely upon an administrative decision arising from Illinois, *In Re Prairie State Generating Company*, PSD Appeal Number 05-05 (EPA EAB). In that case, PM₁₀ modeling was used as a surrogate for assessing PM_{2.5} pollution by assuming a worst case scenario - *i.e.*, that all particulate matter included within the 10 micron or less range fell within the 0.0 to 2.5 micron range. Since that worst case analysis showed that the PM_{2.5} NAAQS would not be exceeded as a matter of fact in *Prairie State*, the surrogate approach fully answered the legal issue concerning PM_{2.5} compliance. 39-R-19194-95.

While Appellant criticizes the Superior Court for discussing *Prairie State*,

Energy Assoc. Brf. at 42, the Court discussed *Prairie State* only because it is the authority relied upon by Appellant and EPD below and by the ALJ to justify its ruling. The Superior Court's discussion merely shows that *Prairie State* does not answer the PM_{2.5} issue in this case. Indeed, had the EAB's approach in *Prairie State* been followed here, it would have rendered the Longleaf permit illegal. As the Superior Court explained:

The circumstances here are very different than in *Prairie State*.

Instead of employing PM₁₀ modeling as a useful worst-case approximation for PM_{2.5} emissions, Longleaf made no effort at all to show that the PM_{2.5} NAAQS would be satisfied. Had the worst-case approach of *Prairie State* been followed here, it predicted that the PM_{2.5} NAAQS would be exceeded, in violation of the Clean Air Act.

39-R-19195.

In the present case, Appellees affirmatively presented evidence that the PM_{2.5} NAAQS would be violated by the Longleaf plant. That evidence from Appellees' expert (Tran) is the only evidence in the record that actually modeled specifically for PM_{2.5}, and it showed that the plant, if built, would violate the PM_{2.5} NAAQS. It

is that evidence that the ALJ literally refused to consider in making her finding on the issue of whether the proposed Longleaf plant would violate the PM_{2.5} NAAQS. And it is the refusal to consider that evidence at all, and the ALJ's making a supposed "finding" without considering the evidence, that renders illegal the ALJ's "finding" on this issue. As the Superior Court stated:

Petitioners offered affirmative evidence from their expert who specifically modeled for and determined the actual PM_{2.5} levels that would occur in the Early County attainment area if the Longleaf plant were built. He concluded that "modeling of PM_{2.5} shows concentrations during normal operations will exceed the 24-hour NAAQS (National Ambient Air Quality Standards)." (Tran Affidavit). Nevertheless, the ALJ granted Respondents' motion for summary determination on the PM_{2.5} issue, concluding that the PM₁₀ modeling Longleaf performed was sufficient, as a matter of law.

39-R-19195. Given these facts, the Court's holding was necessarily demanded by the record:

The Court concludes that the ALJ erred. *The issue here is not*

whether PM₁₀ surrogate modeling may or may not be relevant, or even sufficient in some circumstances. Rather, the issue in this case is whether the decision-maker can ignore relevant evidence on the issue of whether or not the NAAQS for PM_{2.5} will actually be violated. The only actual modeling evidence of PM_{2.5} in this record shows that the proposed facility would exceed the NAAQS for PM_{2.5} in violation of 42 U.S.C. § 7475(a)(3). The ALJ refused to even consider that evidence, and that was error. While the surrogate approach permits consideration of PM₁₀ modeling evidence, it does not allow the ALJ to ignore other relevant evidence. 39-R-19195-96 (emphasis added).

This simple ruling has nothing to do with the raft of complaints Appellant now raises in this Court. The Superior Court went on to further address the fatal flaws in the Energy Associates/EPD argument, which was adopted by the ALJ, as follows:

The approach advocated by Respondents and adopted by the ALJ has no support in the law. *Under that approach, the evidence could show*

conclusively that the PM_{2.5} NAAQS would be violated by a proposed facility, but the ALJ would be constrained to "find" otherwise whenever the PM₁₀ limit is satisfied. In effect, that rationale would repeal the PM_{2.5} limit. Nothing in either the guidance or the recent EPA publication allows or requires that result. Ignoring relevant evidence is inconsistent with conducting a hearing and making findings. It is also inconsistent with the Act's provision that renders the permit illegal if the plant would cause the NAAQS for PM_{2.5} to be exceeded. Sup. Ct. Order, 39-R-19193-96 (emphasis added).

2. *Energy Associates' Argument That the Court's Ruling Here "Creates Grave Uncertainty for the Regulated Community" Is Nonsense.*

Unable to criticize the Court's ruling on the merits, Appellant makes the absurd assertion that the ruling creates "grave uncertainty" and leaves applicants with "no defense" to future challenges. Energy Assoc. Brf., p. 43. In fact, the surrogate method may have utility and even be sufficient in some cases. No one has said otherwise. All that is required by the Superior Court's ruling is that the ALJ consider the *evidence in the record* before making its *findings*. There is

nothing novel about that proposition of law. Had the ALJ here simply considered the PM_{2.5} evidence in the record, this issue would be a very different one. It may well be, for example, that the ALJ – based on the actual evidence – would have found that the PM_{2.5} limit would be violated by Longleaf. That would have prevented the issuance of the permit for the plant as proposed, and there would have been no PM_{2.5} issue here. Or the ALJ might have found the PM_{2.5} modeling evidence from Petitioners’ expert Tran less persuasive than the surrogate evidence, and found – based on the entire record – that the PM_{2.5} limit would be satisfied. We simply do not know because the ALJ *did not consider the evidence* in the record, and that is the legal error here.

It is unfathomable how that narrow ruling – which simply states the law applicable to all fact finders – might leave a permit applicant with “no defense.” Clearly, Appellant makes such spurious assertions because it has nothing to say on the merits of the Superior Court’s actual ruling.

3. *The Court’s Actual Ruling Does Not Conflict with Any EPA Regulation or Guidance, and EPA Has Explicitly Approved of the Superior Court’s Order as an Appropriate Resolution of PM_{2.5} Issues.*

In the Superior Court, the parties extensively briefed their respective interpretations of previous EPA guidance on PM_{2.5} modeling and the surrogate approach. But because the Court's ruling was predicated on the narrow holding that the evidence before the ALJ had to be considered in order to have legal fact finding, the Court never had to sort through the parties' differing contentions over how surrogate modeling might be used generally. As the Superior Court stated: "Given this Court's ruling concerning the PM_{2.5} issue, it need not resolve the nuances of the parties' arguments concerning when the surrogate approach may satisfy the Act as a general matter in the absence of other evidence." 39-R-19196. While the Court did not need to address these "nuances," it is only those kinds of issues that Appellant addresses in its brief.

While Appellees would show that Appellant's supposed "interpretations" of EPA guidance are misplaced if they were at issue, far more relevant is the fact that the EPA has expressly approved of how the Superior Court addressed the PM_{2.5} issue in this case. Requiring the PM_{2.5} issue to be determined on the actual record, as the Superior Court did here, simply means that each case should be decided on its actual facts. That is precisely the approach the EPA endorses, and it has cited

the Court's Order here as an example of that approach. See EPA's Memorandum in Opposition to Petitioner's Motion for Stay, pp.13-14, filed Sept. 29, 2008, NRDC v. EPA, Case No. 08-1250 (D.C. Cir.) (relevant excerpts attached as Ex. 1 hereto). As EPA states there, "*the adequacy of using PM₁₀ as a surrogate for PM_{2.5} is still subject to evaluation* – and, if challenged, judicial review – *on a case-by-case basis whenever evidence is presented* indicating that PM₁₀ may not be a reliable surrogate for PM_{2.5} for purposes of a particular permit application." *Id.* (emphasis added). After that statement, the agency cites to the Superior Court's ruling in this case as an example of that approach. *Id.* at 14. The Superior Court here simply held that the ALJ must look at the evidence to make its findings. Without that, it is impossible to know whether the legal NAAQS limit for PM_{2.5} would be met.

D. The Superior Court Correctly Held That the ALJ's Decision Was Illegal for Failure to Apply the Required *De Novo* Standard of Review (Enumeration No. 4).

Appellees have extensively briefed this issue in the companion case, A09A0388, involving EPD's appeal. As shown there, it is beyond dispute that the ALJ did not perform a *de novo* review of the evidence in this case. Throughout,

the ALJ, instead, deferred to the positions taken and facts asserted by EPD and the applicant. That was clear legal error because the governing law requires that the ALJ make an independent decision as a *de novo* fact finder.

Since this issue is thoroughly brief by these Appellees in their brief in the companion case, Appellees will not reiterate all that they said there. Rather, they incorporate that brief *in toto*, and Argument A in particular, in response to Energy Associates' enumeration of error and argument on this point. The Superior Court was plainly correct in its holding that: "It is clear that the ALJ did not make *de novo* findings or decisions concerning emissions limitations or other issues. The ALJ repeatedly rejected contentions of Petitioners not because the facts did not support Petitioners' position, but because the ALJ concluded that EPD's decision was not unreasonable. 39-R-19188-89. Similarly, based on the governing statute, rules, precedents from this Court and the Georgia Supreme Court, the Superior Court necessarily held that the ALJ's entire review was improper and illegal.

E. The Superior Court Correctly Ruled That the ALJ's Dismissal of Counts XIII and XIV of the Amended Petition Was Improper and Required Reversal (Enumeration Nos. 5 and 6).

This issue was thoroughly in the Brief of Appellees in the companion case,

Appeal No. A 09A0388, including in particular Argument B. In addition, as set forth in that Brief, it should be noted that Energy Associates did not file a motion before the ALJ to dismiss Counts XIII and XIV of the Amended Petition.

Therefore, Energy Associates' Enumerations 5 and 6 should be dismissed, since they preserved no issue on which they are entitled to appeal to this Court from the Superior Court's ruling. Indeed, counsel for Appellant affirmatively represented to the ALJ that she took no issue with the legal sufficiency of Counts XIII and XIV of the Amended Petition, and that she was "comfortable" with the allegations as plead. Brief of Appellees, Appeal No. A 09A0388, p. 37 & note 8. Energy Associates cannot now complain of the Superior Court's ruling that these Counts were sufficiently plead, having acknowledged as much when EPD filed its motion to dismiss those counts.

F. The Superior Court's Ruling With Regard to the Appropriate Role of Engineers in Performing BACT Analyses was Correct in Light of the Record in this Case (Enumeration Nos. 7 and 8).

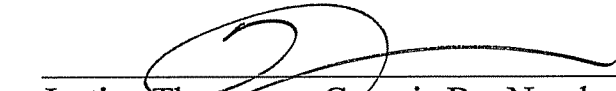
These issues were briefed in Appellees' Brief in Appeal No. A09-A0388, and as Energy Associates do in their Brief, Appellees hereby incorporate by reference the entirety of the Brief of Appellees in the companion case, and in

particular Argument C.

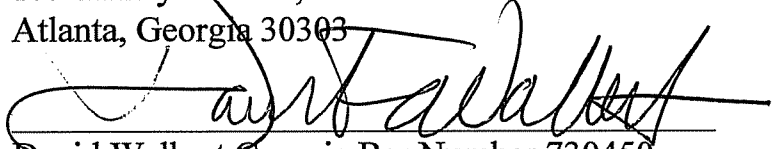
CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Order and Judgment of the Fulton County Superior Court.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE
COUNCIL, and SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

No. 08-1250

ORAL ARGUMENT NOT
YET SCHEDULED

**RESPONDENT EPA'S MEMORANDUM IN OPPOSITION TO
PETITIONERS' MOTION FOR STAY PENDING REVIEW**

INTRODUCTION AND SUMMARY

In this action, Petitioners the Natural Resources Defense Council and Sierra Club ("Petitioners") seek the Court's review, pursuant to section 307(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b), of an EPA final rule entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})."⁷³ See 73 Fed. Reg. 28,321 (May 16, 2008) (the "Final Rule" or "Rule"). On August 18, 2008, Petitioners filed a "Motion for Stay Pending Review" ("Mot.") asking that the Court enjoin selected provisions of the Rule while allowing other closely-related provisions to remain in effect.

For example, in one challenged portion of the Rule, EPA provided that certain newly-promulgated regulatory requirements would take effect immediately in all States subject to the federal implementation plan for "Prevention of Significant Deterioration" ("PSD"), but with the caveat that certain previously-submitted permit applications could continue to rely on an earlier EPA policy allowing a different implementation approach (the "PM₁₀ Surrogate Policy"). 73 Fed. Reg. at 28,340/3; *id.* at 28,349/3 (new regulatory text at 40 C.F.R. § 52.21(i)(1)(xi); see also *infra* at I.A (background regarding PSD), III.A (explaining

the PM10 Surrogate Policy). Petitioners impermissibly seek to stay the caveat, but not the general regulatory requirement. Mot. at 20. The Rule also triggers a three-year deadline for States that have their own approved PSD plans to revise those plans, while allowing these States to rely on the PM10 Surrogate Policy during the transitional period until the plan revisions are due. 73 Fed. Reg. at 28,340/3-28,341/1. Here, again, Petitioners impermissibly seek a *partial* stay that would leave the deadline in place, but stay the integral provision allowing reliance on the earlier policy prior to the deadline. Mot. at 20.

A stay of a newly-promulgated rule may be granted if the movant establishes a substantial likelihood of success on the merits, and demonstrates that such relief is necessary to avert irreparable harm and that staying the rule will not lead to a different and greater harm. See infra at II. A stay is not, however, a means to “rewrite” a rule by severing related provisions and allowing some, but not others, to take effect. This Court has long recognized that “[s]everance . . . of a portion of an administrative regulation is improper if there is substantial doubt that the agency would have adopted the severed portion on its own.” Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (internal quotation omitted); see also North Carolina v. FERC, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (“Whether an administrative agency’s order or regulation is severable . . . depends on the . . . agency’s intent.”). Accordingly, where challenged and unchallenged portions of a rule are “intertwined,” the Court will not sever them by vacating one portion and affirming another. Compare, e.g., Davis County, 108 F.3d at 1459 (provisions that “operate[d] entirely independently of one another” could be severed), with Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (although EPA guidance was challenged only in part, those portions were not severable). Moreover, while the cited cases all concern the form of relief to be granted after a final decision on the

merits, the same approach should be used to determine the scope of a stay pending review, as it arises fundamentally from recognition of the constitutional separation of powers. See National Treasury Employees Union v. Chertoff, 452 F.3d 839, 867 (D.C. Cir. 2006) (“[W]e are obliged to respect the fundamental principle that agency policy is to be made, in the first instance, by the agency itself – not by courts”) (internal quotation omitted); North Carolina, 730 F.3d at 796 (severability is a “jurisdictional” issue).

Thus, with respect to the two sets of closely-related Rule provisions cited above, the proper form of relief – had Petitioners adequately supported their motion – would be to stay those provisions as a whole, thereby restoring the regulatory status quo that existed prior to the rulemaking. However, Petitioners have not requested such relief. Even if they had, a return to the prior status quo would not address Petitioners’ alleged “harm.” Infra at III.A.1.

Even if the Court accepts the premise that the piecemeal stay Petitioners advocate would be an appropriate form of relief, Petitioners still have failed to meet their heavy burden of demonstrating irreparable harm with respect to either of the above-referenced sets of provisions concerning use of the PM 10 Surrogate Policy, or the remaining Rule provisions at issue in this motion (those addressing “condensable” emissions). Infra at III.A.2-3, III.B. Furthermore, a stay could adversely affect the public interest by further delaying States’ revision of the PSD provisions of their SIPs – an outcome that is contrary to Petitioners’ own espoused goal in seeking review. Infra at III.C. Finally, Petitioners have also failed to show a sufficient likelihood of success on the merits. Infra at IV. For these reasons, the Court should deny the “extraordinary” relief Petitioners seek. See Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 978 (D.C. Cir. 1985) (“On a motion for stay, it is the movant’s obligation to justify the court’s exercise of such an extraordinary remedy.”).

I. STATUTORY AND REGULATORY BACKGROUND

A. General Background Regarding NAAQS and New Source Review

The CAA, enacted in 1970 and extensively amended in 1977 and 1990, establishes a comprehensive program for controlling and improving the nation's air quality through a combination of state and federal regulation. Under Title I, EPA identifies criteria air pollutants anticipated to endanger the public health and welfare and formulates national ambient air quality standards ("NAAQS"), which establish maximum permissible concentrations of those pollutants in the ambient air. 42 U.S.C. §§ 7408-09; 40 C.F.R. pt. 50.

Within three years of promulgating a new or revised NAAQS, EPA must "designate" areas of the country as either "attainment" (i.e., meeting that NAAQS), "nonattainment," or "unclassifiable." *Id.* § 7407(d)(1). The CAA sets forth a complex program for implementing NAAQS in these areas, including a preconstruction permitting program, known as "New Source Review" or "NSR," that applies when a stationary source is constructed or modified. *See New York v. EPA*, 413 F.3d 3, 10 (D.C. Cir. 2005) (per curiam). There are several components of the NSR program, including "Prevention of Significant Deterioration" or "PSD," which applies when a major source is constructed or undergoes a major modification in an area designated "attainment" or "unclassifiable" for any criteria pollutant. 42 U.S.C. § 7475; "Nonattainment NSR," which applies to the construction or major modification of major sources in "nonattainment" areas, *id.* §§ 7502(c)(5), 7503; and "minor NSR," which applies generally in all areas and to all sources, *id.* § 7410(a)(2)(C). *See* 73 Fed. Reg. at 28,323/3.¹

In general, a PSD permit may not be issued absent a demonstration that construction or operation of the proposed new or modified major source will not

¹ EPA uses the shorthand term "major source" to refer to the sources defined as being subject to the PSD and Nonattainment NSR programs. *Id.* at 28,323/3 n.2.

PM10 emissions. <<http://cfpub.epa.gov/rblc/htm/bl02.cfm>>; see also CTD at 5.2-26 to 5.2-27, 5.3-23 to 5.3-24 (identifying a wide variety of typical industrial applications for these technologies).

Petitioners' expert alleges that wet ESPs would be required as BACT for PM2.5 at a coal-fired power plant, but provides no analysis to support this claim. See Attachment to Taylor Decl. at 7.⁵ The documents cited above indicate that fabric filters and ESPs have similar control efficiencies for both PM2.5 and PM10, and thus suggest that either technology might be determined to constitute BACT for a particular type of source after a case-by-case analysis. Thus, Petitioners have not demonstrated that the Desert Rock permit or other permits would necessarily require additional technologies to address solid PM2.5 emissions if the Surrogate Policy was not applicable. See Wisconsin Gas Co., 758 F.2d at 674 (alleged injury must be "certain," not "theoretical").

3. Petitioners also fail to show irreparable harm in connection with modeling of air quality impacts.

Petitioners also cite the J.K. Smith Power Plant permit application in Kentucky (a SIP-approved State) as an example of the harm that purportedly will arise from allowing permit applications to model air quality impacts using PM10 as a surrogate for PM2.5. Mot. at 17. What Petitioners overlook, however, is that even in States that are subject to the surrogate policy during the transition period, the adequacy of using PM10 as a surrogate for PM2.5 is still subject to reevaluation – and, if challenged, to judicial review – on a case-by-case basis whenever evidence is presented indicating that PM 10 may not be a reliable

⁵ Determining BACT is a case-by-case process requiring consideration of cost and environmental and energy impacts. EPA recommends a complex five-step analysis to satisfy BACT criteria. See In Re Prairie State Generating Co., PSD Appeal No. 05-05, slip. op. at 14-18 (EPA Env't'l App. Board 2006) (Opp. Ex. G).

surrogate for PM 2.5 for purposes of a particular permit application. See PM10 Surrogate Policy at 2 (the policy “do[es] not bind State and local governments and the public as a matter of law”); 73 Fed. Reg. at 28,341/2 (reiterating that the policy “recommends” the surrogacy approach); see also In re: Southern Montana Elec. Generation & Transmission Cooperative-Highwood Generating Station Air Quality Permit No. 3423-00, Case No. BER 2007-07 AQ, slip. op. at 44 (Montana Board of Env’tl Review May 30, 2008) (Opp. Ex. H) (concluding that surrogacy approach was not supported by the record and remanding with instructions to conduct PM2.5 BACT analysis); Friends of the Chattahoochee, Inc. v. Couch, No. 2008CV146398, slip op. at 9-12 (Ga. Sup. Ct. June 30, 2008) (same) (Opp. Ex. I); Harnett Decl. ¶¶ 6-7 (comments regarding surrogacy were submitted in response to 6 of the 9 grandfathered permit applications in delegated States). Because case-by-case remedies are available if particular permits lack record justification for the surrogacy approach, a stay of the Rule is not necessary.

B. Condensable Emissions

“Condensable” particulate matter is emitted in a gaseous form and then condenses in the atmosphere into solid or liquid particles. See 70 Fed. Reg. at 65,992/1. Prior to this rulemaking, EPA guidance indicated that States were required to address condensable emissions in establishing emissions limitations for PM 10, but that guidance was not consistently applied either by EPA or by the States. See 70 Fed. Reg. at 66,044/1; 73 Fed. Reg. at 28,335/1.

In this rulemaking, EPA originally proposed to require that all States immediately begin addressing condensable emissions in determining major NSR applicability and control requirements under the PSD program. See 70 Fed. Reg. at 66,044/1. The Agency received a large number of comments both for and against this proposal, many of which raised concerns about the availability of reliable test methods or emissions estimation techniques for condensable

whether available test methods and modeling techniques were reliable enough to support a requirement that all States immediately begin addressing condensable emissions, as had been proposed. See 73 Fed. Reg. at 28,335 (discussing comments and EPA's response); RTC at 48-52 (same); Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 951 (D.C. Cir. 2004) ("Agencies are free – indeed, they are encouraged – to modify proposed rules as a result of the comments"); New York v. EPA, 413 F.3d at 32 (same). The three-year period for addressing condensable emissions was reasonable given: (a) the above-noted concerns regarding available test methods and modeling; (b) EPA's conclusion that addressing only filterable PM2.5 and PM precursors likely would provide adequate protection of the PM2.5 NAAQS; (c) its finding that technologies selected as BACT or LAER for PM2.5 and PM10 can control condensables; and (d) its recognition that States with SIP provisions requiring condensables to be addressed could continue to enforce those provisions during the transition, and could do so earlier than 2011 at their discretion. See generally 73 Fed. Reg. at 28,334-35; RTC at 50-52; see also 25 Pa. Code §§ 127.81-127.83 (Pennsylvania has adopted the final PSD requirements for PM2.5 without a transition period).⁹

CONCLUSION

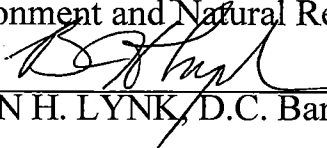
For the foregoing reasons, the Court should deny Petitioners' motion.

Respectfully submitted,

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Dated: September 29, 2008

By:


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⁹ EPA has provided only a partial summary of its merits arguments here. It will address the issues more fully in its Respondent's brief.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on September 29, 2008, I caused a true and correct copy of the foregoing Respondent EPA's Memorandum in Opposition to Petitioners' Motion for Stay Pending Review to be sent by first class mail, postage prepaid, and by electronic transmission to the following counsel, and that on the same date I caused a separately bound, true and correct copy of Exhibits A through M to the Memorandum to be sent by overnight delivery to the same counsel:

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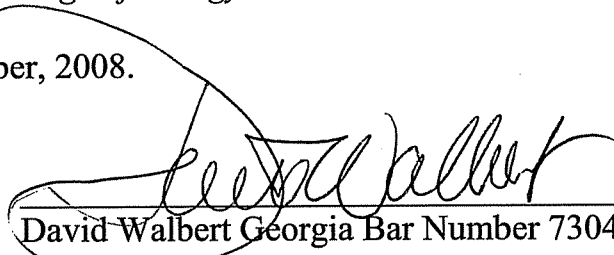
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